

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

UNITED STATES OF AMERICA,

Case No. 2:14-cr-00249-APG-PAL

ORDER

(Mtn for SDT – Dkt. #183)

V.

WEI SENG "PAUL" PHUA, et al.,

## Defendants.

13 This matter is before the court on Defendants Wei Seng Phua's and Darren Wai Kit  
14 Phua's Joint Application for Subpoena Duces Tecum to CenturyLink to be Issued Pursuant to  
15 Federal Rule of Criminal Procedure 17(c) (Dkt. #183) filed September 23, 2014. The court has  
16 considered the Application.

## BACKGROUND

18 On July 14, 2014, a Complaint (Dkt. #1) was filed against Defendants Wei Seng Phua  
19 and Darren Wai Kit Phua and others, charging them with transmission of wagering information  
20 and aiding and abetting in violation of 18 U.S.C. § 1084(a) and 18 U.S.C. § 2; and operating an  
illegal gambling business and aiding and abetting in violation of 18 U.S.C. § 1955 and 18 U.S.C.  
21 § 2. The Phua Defendants made an initial appearance with counsel on the Complaint on July 14,  
22 2014, entered not guilty pleas, and were released on cash bonds with Pretrial Services'  
23 supervision and conditions. *See Minutes of Proceedings (Dkt. #20).*

25 On July 29, 2014, the federal grand jury returned an Indictment (Dkt. #86) against the  
26 Phua Defendants and their co-Defendants, charging them with transmission of wagering  
27 information and aiding and abetting in violation of 18 U.S.C. § 1084(a) and 18 U.S.C. § 2; and  
28 operating an illegal gambling business and aiding and abetting in violation of 18 U.S.C. § 1955

1 and 18 U.S.C. § 2. The Indictment also contains two forfeiture allegations. The Phua  
 2 Defendants were arraigned on the Indictment and entered not guilty pleas on August 5, 2014.  
 3 See Minutes of Proceedings (Dkt. ##112, 113). On September 19, 2014, the court held a  
 4 scheduling conference and directed defense counsel to file any motions to suppress no later than  
 5 October 14, 2014. See Minutes of Proceedings (Dkt. #181).

## 6 DISCUSSION

7 The Phua Defendants seek an order requiring the Clerk of Court to issue a subpoena  
 8 duces tecum to the custodian of records for CenturyLink concerning the CenturyLink digital  
 9 subscriber lines (“DSLs”) in Villas 8881, 8882, and/or 8888 located in Caesar’s Palace Hotel and  
 10 Casino in Las Vegas, Nevada, between June 1, 2014, and July 31, 2014. The Phua Defendants  
 11 assert they were occupying these Villas between June 6, 2014, and July 14, 2014, and were  
 12 allegedly using CenturyLink’s internet service. Defendants assert they have obtained  
 13 information through discovery that agents of the United States and/or Caesar’s Palace  
 14 intentionally shut off internet service in the Villas so that agents could enter under the guise of  
 15 being legitimate repair personnel. As a result, the information requested from CenturyLink is  
 16 relevant to the betting allegations in the Indictment and to whether the searches of the Villas  
 17 were legal.

18 Rule 17 of the Federal Rules of Criminal Procedure governs the issuance of subpoenas in  
 19 criminal proceedings. Rule 17(c) establishes the process by which federal courts can issue  
 20 subpoenas duces tecum for the production of evidence before trial and provides:

21 A subpoena may order the witness to produce any books, papers,  
 22 documents, data, or other objects the subpoena designates. The  
 23 court may direct the witness to produce the designated items in  
 24 court before trial or before they are to be offered in evidence.  
 When the items arrive, the court may permit the parties and their  
 attorneys to inspect all or part of them.

25 Fed. R. Crim. P. 17(c)(1).

26 Unlike a subpoena issued under Rule 17(a) or 17(b) to compel a witness to appear at trial,  
 27 the court has discretion to direct that a subpoena duces tecum be made returnable **before** trial.  
 28 However, Rule 17 is not a discovery device. *United States v. Nixon*, 418 U.S. 683, 689 (1974),

1       superceded by statute on other grounds, Fed. R. Evid. 104(a); see also *United States v.*  
 2       *LaRouche Campaign*, 841 F.2d 1176, 1179 (1st Cir. 1988); *United States v. Fletcher*, 461 F.  
 3       Supp. 2d 1101, 1102 (D. Ariz. 2006) (“[s]ubpoenas issued pursuant to Rule 17(c) are not  
 4       discovery devices and may not be used to expand the scope of Rule 16”); *United States v.*  
 5       *Shinderman*, 232 F.R.D. 147, 150 (D. Me. 2005); *United States v. Carter*, 15 F.R.D. 367, 369 (D.  
 6       D.C. 1954) (“to construe Rule 17 as a discovery rule would render Rule 16 nugatory and  
 7       meaningless and would defeat its limitations”). Rule 17(c) may, however, be used to obtain  
 8       evidentiary materials. *See Nixon*, 418 U.S. at 699-700; *Bowman Diary Co. v. United States*, 341  
 9       U.S. 214, 219-20 (1951).

10       Rule 17(c)(1) does not authorize a party to subpoena a witness and require him to report  
 11       at some time or place other than either a trial or hearing to be held at which he is to testify. Its  
 12       purpose is to permit the issuance of subpoenas only to compel attendance at hearings conducted  
 13       by the court and trial. *See United States v. LaFuente*, 54 F.3d 457 (8th Cir. 1995), *cert. denied*,  
 14       516 U.S. 902 (prosecutor improperly secured attendance of witness at pretrial interview by  
 15       subpoena); *United States v. Keen*, 509 F.2d 1273 (6th Cir. 1975) (government’s use of subpoenas  
 16       to compel witnesses to attend pretrial interview miles from place of trial at a proceeding not  
 17       authorized by court was improper); *United States v. Stirone*, 168 F. Supp. 490 (D. Pa. 1957),  
 18       *aff’d*, 262 F.2d 571 (3rd Cir. 1958), *rev’d on other grounds*, 361 U.S. 212 (1960) (improper for  
 19       government to issue subpoenas compelling witnesses to appear at U.S. Attorney’s Office in  
 20       federal courthouse to ensure keeping of proper records).

21       Leave of court is required for a pretrial subpoena duces tecum. *United States v.*  
 22       *Beckford*, 964 F. Supp. 1010, 1021 n.10 (D. Va. 1997). A number of courts have held that the  
 23       court has discretion to require production of documents by subpoena duces tecum prior to trial.  
 24       *United States v. Lieberman*, 608 F.2d 889 (1st Cir. 1979), *cert. denied*, 444 U.S. 1019; *United*  
 25       *States v. Parker*, 586 F.2d 422 (5th Cir. 1978), *cert. denied*, 441 U.S. 962; *United States v.*  
 26       *Murray*, 297 F.2d 812 (2nd Cir. 1962), *cert. denied*, 369 U.S. 828. The Supreme Court has  
 27       stated:

28       Enforcement of a pretrial subpoena duces tecum must necessarily  
 be committed to the sound discretion of the trial court since the  
 necessity for the subpoena most often turns upon a determination

1 of factual issues. Without a determination of arbitrariness or that  
 2 the trial court finding was without record support, an appellate  
 3 court will not ordinarily disturb a finding that the applicant for a  
 4 subpoena complied with Rule 17(c).

5 *Nixon*, 418 U.S. at 702.

6 The burden is on the party seeking production to show good cause for the production  
 7 before trial. In *United States v. Iozia*, the district court formulated a standard for establishing  
 8 good cause for production prior to trial requiring a showing:

- 9 1. That the documents are evidentiary and relevant;
- 10 2. That they are not otherwise procurable by the defendant  
     reasonably in advance of trial by exercise of due diligence;
- 11 3. That the defendant cannot properly prepare for trial  
     without such production and inspection in advance of trial  
     and the failure to obtain such inspection may tend  
     unreasonably to delay the trial; and
- 12 4. That the application is made in good faith and is not  
     intended as a general fishing expedition.

13 F.R.D. 335, 338 (D.C.N.Y. 1952). Other federal courts have generally followed the *Iozia* test  
 14 for establishing good cause for pretrial production. *See, e.g.*, *Nixon*, 418 U.S. at 699; *United*  
 15 *States v. Stein*, 488 F. Supp. 2d 350, 366 (S.D.N.Y. 2007); *U.S. v. Gel Spice Co., Inc.*, 601 F.  
 16 Supp. 1214 (D.C.N.Y. 1985).

17 The Phua Defendants assert that although they have satisfied the requirements under  
 18 *Nixon* and *Iozia*, the court should apply the less stringent standard set forth by the United States  
 19 District Court for the Southern District of New York in *United States v. Tucker*, 249 F.R.D. 58  
 20 (S.D.N.Y. 2008) because this subpoena is directed to third party CenturyLink and not to the  
 21 government. In *Tucker*, the court observed that where a criminal defendant seeks to subpoena  
 22 material from a third party rather than the government, the *Iozia* standard may not apply, and the  
 23 defendant “need only show that the request is (1) reasonable, construed as material to the  
 24 defense, and (2) not unduly oppressive for the producing party to respond.” *Id.* at 65. The Ninth  
 25 Circuit has not addressed this issue, instead applying the *Nixon* factors to a defendant’s Rule  
 26 17(c) subpoena of a third party. *See United States v. Nosal*, 291 F.R.D. 403, 407 (N.D. Cal.  
 27 2013) (citing *United States v. Eden*, 659 F.2d 1376, 1381 (9th Cir. 1981)). The court need not  
 28 decide this issue here because it finds that the Phua Defendants have articulated why the

1 materials described in the proposed subpoena are relevant and evidentiary to potential motions to  
2 suppress to be filed in this matter and have satisfied the remaining *Iozia* factors as well.

3 Accordingly,

4 **IT IS ORDERED** that the Phua Defendants' Application for a Subpoena Duces Tecum  
5 (Dkt. #183) is GRANTED as follows:

6 1. The Clerk of Court shall issue a subpoena duces tecum for the items specified on  
7 Attachment A, attached to the proposed subpoena duces tecum, submitted with the  
8 Joint Application, as Exhibit 1. The subpoena shall require CenturyLink to produce  
9 responsive documents to the Clerk of Court no later than **October 9, 2014**.

10 2. Counsel for the Phua Defendants shall serve the subpoena duces tecum and  
11 attachment on the custodian of records for CenturyLink, along with a copy of this  
12 Order.

13 3. The custodian of records for CenturyLink shall respond to the subpoena and produce  
14 responsive materials to the Clerk of the Court on or before **October 9, 2014**. The  
15 Clerk of Court shall retain the materials and notify counsel for all parties that the  
16 materials are available for inspection and copying.

17 4. Alternatively, CenturyLink shall have until **October 9, 2014**, to file a motion to quash  
18 or modify pursuant to Rule 17(c)(2) of the Federal Rules of Criminal Procedure if it  
19 believes compliance with the subpoena duces tecum would be unreasonable or  
20 oppressive.

21 Dated this 30th day of September, 2014.

22  
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24   
PEGGY A. LEEN  
25 UNITED STATES MAGISTRATE JUDGE  
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